No. 92-1292

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In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., MICHAEL JACKSON D/B/A ATV MUSIC, MAC DAVIS, DOLLY PARTON, NASHVILLE SONGWRITERS' ASSOCIATION INTERNATIONAL, NATIONAL ACADEMY OF SONGWRITERS AND THE SONGWRITERS GUILD OF AMERICA IN SUPPORT OF RESPONDENT

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National Music Publishers' Association, Inc., Michael Jackson d/b/a ATV Music, Mac Davis, Dolly Parton, Nashville Songwriters' Association International, National Academy of Songwriters, and The Songwriters Guild of America (collectively, the "Songwriter/Publisher *amici*") submit this brief as *amici curiae* in support of respondent, Acuff-Rose Music, Inc. ("Acuff-Rose"). Consents of the parties have been lodged with the Clerk.

STATEMENT OF INTEREST

The Songwriter/Publisher *amici* represent creators of musical works. National Music Publishers' Association, Inc. ("NMPA"), with 514 members, is the principal trade association of music publishers in the United States. Because the music publishing business is governed by the Copyright Act, the primary functions of NMPA are to seek enactment of changes or clarifications in the Copyright Act favorable to music publishers, to educate the public on the need for copyright protection and, more generally, to protect the interest of copyrights in musical works. A wholly owned subsidiary of NMPA, The Harry Fox Agency, Inc. ("Harry Fox"), serves as a licensing and collection agent for its 12,000 publisher clients. NMPA and Harry Fox, in serving the interests of publishers, frequently bring or facilitate litigation seeking an interpretation of the Copyright Act and/or relief against copyright infringers.

Michael Jackson, Mac Davis, and Dolly Parton are among America's most popular and successful songwriter-performers. Mr. Jackson's songs include "Billie Jean," "Beat It," and "Black or White." His company, ATV Music, owns a major part of the catalog of the Beatles' songs. Mr. Davis wrote three hits for Elvis Presley, including "In the Ghetto," and has also written songs for Kenny Rogers, Bobby Goldsboro, and O.C. Smith, among others. Ms. Parton has written numerous country classics, including "Coat of Many Colors," "Jolene," "Yellow Roses," and "I Will Always Love You."

Nashville Songwriters' Association International, established in 1967, is a not-for-profit trade association working to advance, promote, and benefit both professional and aspiring songwriters in all fields of music. Based in Nashville, it represents 3800 songwriters who reside in all fifty states and fourteen countries around the world.

National Academy of Songwriters is a twenty-year-old non-profit educational organization committed to advancing the rights and recognition of songwriters. Based in Los Angeles, it has 3000 members around the country.

The Songwriters Guild of America, founded in 1931, is a national voluntary songwriters' protective association with nearly 5000 members. Run by and for songwriters, it has been devoted exclusively to providing songwriters with the services and activities they need to succeed in the business of music, including contract review and royalty collection.

The fair use defense functions as a pressure valve in the Copyright Act, allowing courts to balance and resolve the tension between the interests of copyright owners and the interests of those wishing to use copyrighted works. As devised by the courts and as codified by Congress, the four non-exclusive factors of §107 have served well these competing interests and have allowed each tested case to be fairly evaluated in its own circumstances. Up to now, no type of use has been treated as presumptively "fair" or as altogether shielded by the First Amendment from fair use analysis.

The Court is now asked by petitioners and their *amici* to adjust the valve measurably for parody, and lift it to its own plane of protection. The adverse consequences of this adjustment to owners of copyrights in musical works would be immediate and extreme: they would stand to lose millions of dollars in revenues from their works that Congress intended them to receive as a reward and

incentive for creativity. The Songwriter/Publisher *amici* submit this brief to present the interests of owners of copyrights in musical works and to urge the Court to preserve in their essentials the well-calibrated standards of fair use.

SUMMARY OF ARGUMENT

This case implicates not only the interests of parodists but at least as much the interests of copyright owners. Congress has given broad protection and a bundle of exclusive rights to the owners of copyrights in musical works intending that, through exploitation of their rights, they will be rewarded for their creativity and motivated to compose and publish additional musical works. In ruling on the affirmative defense of fair use in a musical parody case, a court must give full weight to the rights of the owner of the parodied work.

Parody is accorded no unique exemption under the Copyright Act, nor did Congress make parody presumptively a fair use of a copyrighted work. Instead, an unlicensed parody of a musical work, under the structure Congress enacted, is an infringement unless the parody is found to be a fair use under the criteria of §107 of the Copyright Act. The First Amendment does not preclude a finding of infringement; the Copyright Act already embodies First Amendment protection in the idea/expression dichotomy and the fair use defense.

There is no occasion to abandon the fair use test for parody; the non-exclusive factors codified in § 107 have provided a sensible balance when applied by the lower courts in numerous parody cases. As petitioners' *amici* report, parody is flourishing in the setting of these decisions. Under § 107, some works that are claimed to be parodies will be treated as fair uses, so that the parodists may exploit their own works without license from or payment to the owners of the parodied works. Other parodies will

be held to exceed the limits of §107, and — absent licenses from the copyright owners — will be infringing uses. In drawing the line, a court should consider, inter alia, the target of the parody, the degree of commercial exploitation, the amount taken to conjure up the parodied work, and the likelihood of harm to any of the potential markets for an original song.

If the Court were to unleash a sweeping privilege to use copyrighted musical works in favor of parodists, customary practices in the songwriting and music publishing industries would be totally disrupted and songwriters and music publishers would suffer severe economic harm. A shift in law that converts a licensed use into a fair use automatically results in the forfeiture of a portion of the livelihoods of creators of music. The stakes are high: songwriters and music publishers are presently entitled to receive millions of dollars per year from licensed parodies, licensed full lyric substitutions, licensed ads, and licensed rap versions of songs. The magnitude of what is at risk in this case is much greater, because copyright owners are entitled to royalties not merely for one year but for the full terms of their copyrights. A fundamental change in the law of fair use would also hamper owners of copyrights in musical works in their efforts fully to exploit these works in sound recordings and in other media.

The Sixth Circuit's decision is amply supported by the record. In particular, 2 Live Crew's "Pretty Woman" is at the height of commercial exploitation: an expansive use of "Oh, Pretty Woman" conceived for a mass market by a best selling musical group that utilizes the copyright system to protect its own right to revenues from album sales.

ARGUMENT

I. AN UNLICENSED MUSICAL PARODY, IF NOT FOUND TO BE A FAIR USE OF THE UNDERLYING COPYRIGHTED MUSICAL WORK, IS AN INFRINGEMENT OF THAT MUSICAL WORK.

Acuff-Rose has, without question, established the elements of a copyright infringement claim: "Oh, Pretty Woman" is a copyrightable original musical work; Acuff-Rose owns the copyright in this song and has met all statutory requirements to protect its copyright and to bring suit; and 2 Live Crew, with access to "Oh, Pretty Woman," has made an unauthorized derivative work that is substantially similar to "Oh, Pretty Woman." *See generally Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992) (stating the elements of an infringement claim). The sole issue is whether 2 Live Crew has met its burden on the defense of fair use.

Petitioners and their *amici* have addressed almost exclusively the purported parody by 2 Live Crew and the place of parody under the fair use defense. The Songwriter/Publisher *amici* urge that to apply properly the "equitable rule of reason" in this or in any other parody case, a court must give full account to the rights and protections granted by Congress to the owners of the parodied work. We, therefore, first review the statutory framework governing the use of musical works (Point IA). We next turn to the treatment of parody under the Copyright Act (Point IB). With the positions of a copyrighted musical work and a parody under the Copyright Act in clear focus, we then show how the fair use factors as applied by lower courts permit the intended balance between the interests of copyright owners and the interests of parodists, and how a fundamental shift in fair use law to favor parodists would cause substantial economic harm to songwriters and music publishers (Point IC).

A. Musical Works Are Given Broad Protection Under the Copyright Act.

Musical works are expressly recognized under the Copyright Act as protectable works of authorship. *See* 17 U.S.C. § 102(a)(2) (1988). The owner of the copyright in a musical work enjoys the bundle of rights enumerated in § 106 — that is, the

> exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
>
> (4) . . . to perform the copyrighted work publicly; and
>
> (5) . . . to display the copyrighted work publicly.

17 U.S.C. § 106 (1988). Within the songwriting and music publishing industries, the statute gives a copyright owner exclusive control, inter alia, over licensing the distribution of phonorecords of a musical work (the "mechanical right"); the use of a musical work in a motion picture or television show (the "synchronization right"); and the performance of a musical work over the air or in public (the "performance right"). *See generally*

Al Kohn & Bob Kohn, *The Art of Music Licensing* (1992). Congress intended that, through exploitation of their rights, owners of copyrights in musical works would be rewarded for their creativity and thereby motivated to compose and publish additional musical works. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

The bundle of exclusive rights is backed by the remedies for infringement of a copyright in a musical work. *See* 17 U.S.C. § 501 (1988 & Supp. III 1991); *see also id.* §§ 502-505 (delineating the remedies available for copyright infringement); *id.* § 506 (describing the criminal offenses). Courts have time and again issued injunctions and awarded damages against persons who copied a copyrighted musical work — that is, persons who created a substantially similar work having access to the original musical work but without having a license for this use. *See, e.g., MCA, Inc. v. Wilson*, 677 F.2d 180, 187 (2d Cir. 1981).

Congress last year gave added protection to musical works in order to ensure further that copyright owners will be justly compensated. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court held that time shifting of broadcast television shows for non-commercial purposes was a fair use of the copyrighted programs and films. *See id.* at 456. Nonetheless, in recognition of the phonorecord sales income that will be lost through home taping of copyrighted musical works on digital audio equipment, Congress created a new royalty fund derived from the sale of digital equipment and recording media, with the royalties to be allocated among creators of music. *See* 17 U.S.C.A. §§ 1003-1007 (Supp. 1993); *see also* House Comm. on the Judiciary, Audio Home Recording Act of 1992, H.R. Rep. No. 873(I), 102d Cong., 2d Sess. 11-12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3578, 3581-82.

One statutory exemption is specifically applicable to musical

works: the compulsory license of § 115. Under this provision, once phonorecords of a sound recording have been publicly distributed in the United States with the consent of the copyright owner, anyone else, subject to the express conditions of § 115, may make and distribute phonorecords of a new sound recording of the copyrighted musical work without express permission from the copyright owner.[1] The section provides for payment of a royalty to the copyright owner for each phonorecord made and distributed under the compulsory license. *See* 17 U.S.C. § 115 (1988). In common practice, Harry Fox, as licensing and collection agent for its music publishing clients, grants licenses (which are written variations of the compulsory license under §115) directly to record companies. *See Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 848 (S.D.N.Y. 1982), *rev'd*, 720 F.2d 733 (2d Cir. 1983), *rev'd*, 469 U.S. 153 (1985); Al Kohn & Bob Kohn, *The Art of Music Licensing* 319-20 (1992).

The Copyright Act of 1976 added an important qualification to the compulsory license provision. A person seeking to make a new sound recording may not materially alter the musical work. In the words of the statute:

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but *the arrangement shall not change the basic melody or fundamental character of the work*, and shall not be subject

1. In the terminology of the Act, "sound recordings" are works that "result from the fixation of musical or other sounds, but not including the sounds accompanying a motion picture or other audio-visual work" — that is, versions or renditions of musical works. 17 U.S.C. § 101 (1988). "Phonorecords" are the material objects in which sound recordings are fixed and include vinyl records, pre-recorded cassettes and compact discs. *Id.*

> to protection as a derivative work under this title, except with the express consent of the copyright owner.

17 U.S.C. § 115(a)(2) (emphasis added). By this qualification, Congress intended "to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted or travestied." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5724. As a result, any person seeking to "change the basic melody or fundamental character of the work" requires a license from the copyright owner. *See* 17 U.S.C. §115(a)(2); *see also* 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.04[F] (1991) [hereinafter Nimmer].

Congress, in sum, has given a broad array of exclusive rights to the owners of copyrights in musical works, including the right preserved under § 115(a)(2) to control fundamental changes to their works. These rights are, of course, subject to the fair use defense of § 107. *See* 17 U.S.C. § 107 (1988); 17 U.S.C.A. § 107 (Supp. 1993). The central issue is thus framed. Where no fair use is found, the copyright owner of a musical work can control the creation of a sound recording that fundamentally changes the work, can exclusively license the musical work and can obtain damages and other remedies for an infringing use. In contrast, where fair use is found, the copyright owner has no control over that use and is not compensated for it. Weighing the broad protections Congress intended for owners of musical works, fair use is properly viewed as "a *limited* privilege in those other than the owner of a copyright to use the copyrighted material in a *reasonable* manner without the owner's consent." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (emphasis added).

B. Parodies Are Not the Subject of Any Unique Exemption Under the Copyright Act.

This Court is urged by petitioners and several *amici* to rewrite fundamental principles of copyright law in order to give enhanced insulation to parodies. Some propose that parody be declared presumptively a fair use; others propose that parody be freed by the First Amendment from at least some of the fair use criteria that apply to news gatherers, scholars, social critics and everyone else. These proposals are entirely at odds with the statute Congress enacted and with prior decisions of this Court.

Parody does not stand alone on a pinnacle of protected speech. There is no unique exemption for parody under the Copyright Act. Congress did refer in its legislative reports to the "use in a parody of some of the content of the work parodied" among "the sort of activities the courts might regard as fair use under the circumstances," *see, e.g.*, S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975) — although, in the Act itself, Congress did not specifically include parody among the examples of possible fair uses. *See* 17 U.S.C. § 107. Parody is unquestionably eligible for fair use treatment but, for a particular parody to be held to be a fair use, a court must apply the criteria of § 107. Parody cannot be presumptively viewed as fair use. As this Court has held, Congress did not intend

> to single out any particular use as presumptively a "fair" use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539,

561 (1985); *see also Fisher v. Dees*, 794 F.2d at 435 (refusing to classify parody as presumptively fair use).[2]

In *Harper & Row*, the Court explained why the First Amendment, a part of the same Constitution that created the power to grant copyrights, does not override the limitations on use of copyrighted works enacted by Congress. The Copyright Act already embodies First Amendment protection in its "distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Harper & Row*, 471 U.S. at 560; *see also Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (stating that the idea-expression dichotomy adequately balances copyright and free speech interests), *cert. denied*, 439 U.S. 1132 (1979); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578-79 (1977) (sustaining a right of publicity

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2. The Court's attention is drawn by petitioners and certain *amici* to a passing reference in the legislative reports that "[w]ith certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." *See, e.g.*, S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975). The operative word in this sentence is "might." The Congressional reports did not suggest that all parodies can supplant the normal markets for copyrighted works and still be considered fair use. Instead, each parody must be judged under the criteria of §107 in its own circumstances.

Petitioners argue that their "creative derivative work" should be treated as a presumptively fair use because it "possesses the two fundamental criteria for copyright protection . . . : 'originality' 'and fixation in tangible form.' " (Pet. Br. 12-13). If the fact that a parody qualifies as a copyrightable derivative work gave rise to a presumption of fair use, the defense would eliminate copyright protection for parodied works. In the typical parody case — as in countless infringement cases involving uses other than parody — the allegedly infringing work will qualify as a copyrightable derivative work. *Cf. Harper & Row*, 471 U.S. at 563-64.

claim against First Amendment defense where broadcasters had transmitted the entire act of a "human cannonball"). The idea-expression dichotomy and the fair use defense were initially crafted by courts, before being codified in the Copyright Act, *see* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680; these judicially developed doctrines have permitted our nation's copyright statutes and the First Amendment to coexist comfortably for two centuries.

In this balance between copyright and free speech interests, and under the Copyright Act, a parodist might be unable to meet the fair use criteria as grounds for copying a particular copyrighted musical work without permission. He or she could, as an alternative, seek a license to use the musical work; copyright owners often do license their musical works to parodists. *See, e.g.*, Charles J. Sanders & Steven R. Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 Fordham Ent., Media & Intell. Prop. L. Forum 11, 34-36 (1990) (noting that Weird Al Yankovic obtains licenses to use near verbatim copies of copyrighted music with his original parody lyrics).[3] Consent to a license, however, can be denied. "In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207,

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3. The Harvard Lampoon's several magazine parodies are examples of works that not only have *authorization*, but also *cooperation*, from the creators of the parodied works. *See, e.g.*, Scott Donation, Advertising Age, July 24, 1989, at 52 (noting that the Forbes Magazine parody was developed "with the cooperation and enthusiasm of Forbes Inc. Chairman Malcolm Forbes"); Joan Mower, UPI, October 14, 1981, *available in* LEXIS, Nexis Library, UPI File (" 'People' magazine . . . gave permission for the Lampoon to imitate its style. . . . A memo from 'People' saying: 'To: The Harvard Lampoon — Compliments from the real thing,' was printed in the parody."); *Parody Set, By Harvard Lampoon*, N.Y. Times, June 23, 1982, at D-16 (discussing the Newsweek parody and noting that "the concept was . . . greeted at the real Newsweek with, if not outright enthusiasm, at least with much cooperation").

229 (1990) (holding that the owner of the copyright in the motion picture "Rear Window" infringed the copyright in the underlying story where the movie was re-released after the grant of rights in the story had lapsed).

Denied a license, a parodist might, among other possible options, seek a license for a different song; use a public domain song; compose a new song to parody another song or some other subject; or alter the planned use of the copyrighted musical work to fit within the confines of fair use. If the parodist elects instead to use the copyrighted musical work without license and is outside the reach of fair use, he or she will, and should, be subject to a finding of infringement. *See, e.g., New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1524 (S.D.N.Y. 1988).

That is the precise lesson of the *Harper & Row* case, in which this Court found a news report on President Ford's pardon of President Nixon to be a copyright infringement because the magazine excessively appropriated President Ford's unpublished memoirs. Inherent in the copyright monopoly recognized by Article I, Section 8, Clause 8 of the Constitution and enacted by Congress is a restriction on the use of copyrighted works:

> In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

Harper & Row, 471 U.S. at 558. This Court achieved in *Harper & Row* the balance of interests intended by Congress. Notably, after the *Harper & Row* case, Congress amended § 107 solely to state

that an unpublished work is subject to the fair use defense, *see* 17 U.S.C.A. § 107 (Supp. 1993); Congress did not alter § 107 to give presumptive fair use treatment to any type of work. The balance struck by the Court has thus been revisited by Congress and found just. There is no sound basis for the logic of several *amici* that the Court should now reverse course and permit any author of a parody to make totally unrestricted use of copyrighted works, subject only to whether the parody fulfills the demand for the parodied work. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 338-39 (1988) (recognizing that Congress' failure to disturb a judicial interpretation of a statute that has been otherwise amended provides "some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].' " (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)).

C. The Fair Use Factors Allow a Sensible Balance Between the Copyright Owner and the Parodist.

There is no cause for a sea change in the law of fair use. Both before and after enactment of the Copyright Act, the lower courts have applied the fair use factors now codified in § 107 to claimed parodies. There appears to be no conflict among the circuits. Reflecting the exercise of an equitable rule of reason, courts over the last thirty years have found some claimed parodies to be infringing works, *see, e.g., Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *MCA, Inc. v. Wilson*, 677 F.2d at 185; and others to meet the fair use defense, *see, e.g., Fisher v. Dees*, 794 F.2d at 440; *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In the meantime, parody has been alive and well in the United States — indeed, as recounted in detail by petitioners' *amici*, parody has been flourishing.

As the law has developed, courts have added nuances to the fair use factors that are especially relevant when a claimed parody is present. The Songwriter/Publisher *amici* urge that the Court

include these nuances, to which we now turn, in ruling on fair use in this case.

1. *Purpose and Character of the Use*

The threshold question in a fair use parody case is whether the defendant actually intended to, and did, create a parody. Because invocation of the word "parody" can potentially turn an infringement into a protected use, the courts have properly scrutinized the true purpose of the defendant's work. *See, e.g., New Line Cinema*, 693 F. Supp. at 1525 (expressing "serious doubts" whether defendant's video was a parody). As the Second Circuit has aptly observed:

> We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism.

MCA, Inc. v. Wilson, 677 F.2d at 185; *cf. Harper & Row*, 471 U.S. at 557 ("The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report' of the book.").

A vital aspect of the inquiry is to determine the target of the claimed parody; there is no need to draw upon a copyrighted work if the parodist has nothing to say about that work itself. Thus, in *Rogers v. Koons*, the Second Circuit held that the "purpose and character of the use" factor cut against a finding of fair use because the defendant's sculpture, which was slavishly copied from plaintiff's photograph, sought only to parody society at large and

not the photograph itself. *See Rogers v. Koons*, 960 F.2d at 310. The court stated:

> It is the rule in this Circuit that though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.

Id.; see also Fisher v. Dees, 794 F.2d at 436 (holding that the defendant's song "intended to poke fun" at the copyrighted song, and was not "used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time"); *Metro-Goldwyn-Mayer, Inc v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979) (holding that, in order for a parody to receive fair use protection, it must "make some critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function").

In addition to the purpose, courts look to the commercial or non-commercial character of the use. In *Sony*, this Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." 464 U.S at 451. Quoting this language in *Harper & Row*, the Court added that a desire for monetary gain does not alone tilt this factor against a finding of fair use; rather, the focus is on the degree of exploitation:

> The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

Harper & Row, 471 U.S. at 562. Put another way, if the intended exploitation unfairly deprives the copyright owner of compensation, the use is not likely to survive as a defense under an equitable rule of reason.

There is a range of commercial exploitation in the area of parody. One important element is how ephemeral a use is made of a work. As certain of petitioners' *amici* recount, parodists who specialize in political humor are constantly changing their material with events of the day. The use of a given song might be only a snippet of one performance, a small part of a show soon replaced by other parodies.

Another important element of fair use analysis is the context of the use; a parody included in a textbook or newspaper, even if the publisher seeks a profit, is part of an educative work. *See Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7985, 1993 U.S. App. LEXIS 13454, at *17 (2d Cir. June 7, 1993) ("Most publishers of traditional 'educational' works hope to make a profit, and in many cases ... publishers of traditional 'commercial' work have at least the pretense and often the reality of enlightening the public."); *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) ("Social commentary placed in a newspaper or magazine is not put to a commer[cial] use simply because the publication is sold rather than given to the public."). Indeed, some persons who are paid for their work display a greater concern for its wide dissemination than for potential royalties. *Cf. Sony*, 464 U.S. at 445 (noting that, in his testimony, television educator Fred Rogers "expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times").

The opposite extreme is what most concerns the Songwriter/Publisher *amici*: permanent recordings that are sold for a profit, with the degree of concern rising with the level of mass marketing

activity. Parodists in this category are profit motivated; they are not giving their albums away or waiving their own copyright interests. The mechanical right — and the corollary mechanical royalties it produces upon the distribution of phonorecords — is a critical element in the livelihoods of songwriters and publishers. A use of a copyrighted musical work in a mass-marketed parody recording should be treated as presumptively unfair, since the parodist is seeking to exploit the copyrighted musical work for substantial income "without paying the customary price." *Harper & Row*, 471 U.S. at 562; *see also Twin Peaks*, 1993 U.S. App. LEXIS 13454, at *19 ("We have been more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes.").

2. *Nature of the Copyrighted Work*

The second factor should, in parody cases, almost invariably weigh against a finding of fair use. Parodied works are typically creative, not factual, and are given greater protection from infringement. *See, e.g., Rogers v. Koons*, 960 F.2d at 310. Courts also consider whether the original work was made in anticipation of a financial return, *see id.* at 312; more often than not, parodied works have been created and published with a view to exploiting the panoply of exclusive rights Congress provided.

This second factor should weigh heavily against a finding of fair use in musical parody cases. Under § 115, Congress has assured access to copyrighted musical works for those who wish to make new versions of them — provided the mechanical royalty is paid and the user does not fundamentally alter the musical work. The fair use defense, where sustained, excuses a user from the statutory fee and the restrictions against alteration of the musical work. In view of the balance Congress has already struck in § 115 between copyright owners and prospective users of musical works, courts should, under this second factor, lean away from denying

copyright owners their royalties from, and their control over, musical works.[4]

3. *Amount and Substantiality of the Use*

Extensive appropriation of a copyrighted work is generally inconsistent with a finding of fair use. *See MCA, Inc. v. Wilson*, 677 F.2d at 183. Courts do not permit parodists "to take as much of a component part [of the copyrighted work] as they need to make the 'best parody.' Instead, their desire to make the 'best parody' is balanced against the rights of the copyright owner in his original expressions." *Walt Disney Prods. v. Air Pirates*, 581 F.2d at 758; *see also Harper & Row*, 471 U.S. at 560-69 (refusing to allow a magazine to publish the best news report where it appropriated excessive portions of the copyrighted work).

The Ninth Circuit has fashioned three helpful considerations for "determining whether a taking is excessive under the circumstances — the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody." *Fisher v. Dees*, 794 F.2d at 439. As in both the Second and Ninth Circuits, courts should

4. Relying on this Court's observation in *Harper & Row* that "the scope of fair use is narrower with respect to unpublished works," 471 U.S. at 564, the dissent below concluded that the fact that "Oh, Pretty Woman" is a published musical work should tip this second fair use factor in favor of 2 Live Crew. *See* 972 F.2d at 1144. In the face of certain cases after *Harper v. Row* that suggested an unpublished work was never subject to the fair use defense, Congress amended § 107 to provide expressly that the defense is applicable to unpublished works. *See* 17 U.S.C.A. § 107 (Supp. 1993); H.R. Rep. No. 836, 102d Cong., 2d Sess. 4-5 (1992). This Court should nip in the bud the notion that the fact of publication can somehow be scored against the copyright owner of the copied work in applying the second fair use factor. The concept advanced by the dissent would expose the vast majority of copyrighted works to an unjustifiably expanded defense of fair use.

examine whether the defendant took more than is required to recall or conjure up the original work. *See* 3 Nimmer § 13.05(C), at 13-102.28(16) to -102.28(17) (1992); *see also* S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975) (stating that "use in a parody of *some* of the content of the work parodied" might be among "the sort of activities" treated as fair use (emphasis added)).

Brevity weighs in favor of a finding of fair use. The defense was sustained in a musical parody case where the parody of a full length song ran only twenty-nine seconds, *see Fisher v. Dees*, 794 F.2d at 438, and in another case where the parody lasted only eighteen seconds, *see Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F. Supp. 741, 747 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). In contrast, a full length parody typically involves a substantial taking of the copyrighted musical work, which should tilt this third factor against a finding of fair use.

4. *Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

This Court has already framed the governing standards for the fourth fair use factor. "[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Harper & Row*, 471 U.S. at 568 (quoting *Sony*, 464 U.S. at 451 (emphasis added)). "This inquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Id.* An adverse effect on any of the bundle of rights provided to copyright owners should tilt this factor against a finding of fair use. *See id.* "What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed." *Sony*, 464 U.S. at 451 (emphasis in original).

The Court is urged by several *amici* to find that a parody will not disturb the market of an original music work; it is said that parody reaches a different target audience. The Songwriter/ Publisher *amici* dispute this proposition. The pertinent issue is whether there is some meaningful likelihood of harm to any of the potential markets for an original song. If the Court were to reverse the Sixth Circuit opinion and in doing so alter the fair use standard, songwriters and music publishers would potentially suffer at least five types of harm.

First, despite the assertions of petitioners' *amici*, substantial numbers of parodies are licensed (325a). For example, the Sixth Circuit observed that Weird Al Yankovic — a parodist who records and markets derivative works substituting comedic lyrics while making near verbatim use of copyrighted music — secures licenses from copyright owners. *See* 972 F.2d at 1432-33 n.3. Petitioners themselves equated "Pretty Woman" to Yankovic parodies (87a). Yankovic has released at least five albums to date containing dozens of licensed parodies, generating substantial royalty income for copyright owners. *See* Sanders & Gordon, *supra*, at 36. He has taken licenses of the songs of such composers as Michael Jackson and Billy Joel. Other parodists who have obtained licenses from Harry Fox, acting on behalf of its clients, are Joe Piscopo, Dickie Goodman, Spike Jones, Sheb Wooley, and the producers of "Forbidden Broadway," an off-Broadway review. If parodists are told they may avoid the customary price by invoking the words "fair use," there will be no incentive for them to pay copyright owners.

Second, an expansion of the fair use defense for parody might also interfere with licensing of full lyric substitutions. Harry Fox has issued licenses on behalf of its publisher clients for derivative works which, though not described as parodies, completely substitute a new set of lyrics for use with a copyrighted musical work. One of the most successful examples is the Beach Boys'

"Surfin' U.S.A.," which was a licensed use of the music of Chuck Berry's "Sweet Little 16." "Surfin' U.S.A." has earned millions of dollars in mechanical royalties and continues to be actively licensed some thirty years after release. The derivative work was not treated as a parody when licensed. If all that is required to avoid the need for a license and the obligation to make payments is to say that the new lyrics poke fun at something — like the California lifestyle — there will be a major breach in the protections intended for copyright owners under the Copyright Act.

Third, a revision of the boundary between a fair use parody and an infringing parody might embolden advertisers to claim fair use when copyrighted songs are incorporated into ad campaigns. Sometimes a musical work is simply used in an ad, but often the ad writer makes a parody use of a song. Harry Fox and its publisher clients have issued hundreds of licenses annually for parody uses of musical works in ads. For 1992 alone, Harry Fox collected for its publisher clients almost $4 million from licensed ads, of which half was from licensed ad parodies; these collections represent about 20% of licensed ads using musical works. Unlicensed use of musical works in the promotion of products under current case law is typically not fair use. *See, e.g., Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826, 831 (S.D.N.Y. 1990); *DC Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979). It should not be transformed into a free use under the rubric of "parody."

Fourth, an expansion of fair use for parody would jeopardize the ability of copyright owners to license rap versions of their music. While many rap songs are original compositions, others are derivative versions of copyrighted musical works. It is in the nature of rap music that the basic elements of songs are altered (34a at ¶ 15). These changes are often fundamental alterations, and thus require licenses from copyright owners under §§ 106 and 115. For

example, Markey Mark & the Funky Bunch have made a licensed rap version of the rock song, "Take a Walk on the Wild Side," and Run DMC of the rock song, "Walk This Way." If the rap approach to a popular song is treated as "parody" because some changes might be seen as satirizing the original musical work and its underlying values — or, worse, is treated as "parody" because the changes make a social commentary without ridiculing the copyrighted work itself — the royalty income due the copyright owner will be forfeited. Moreover, the release of a "parody" rap version of a song might discourage other rap groups from making licensed rap versions of that song. At stake is a vast market, now separately charted in *Billboard* and representing some 10% of all album sales. Congress did not intend in §§107 and 115 of the Act to make traditional versions of a copyrighted work subject to the mechanical royalty while exempting an entire category of music from the customary price.

Fifth, a full length version of a song that is widely distributed can saturate the market and discourage other users. This is especially true of a derivative work that takes the melody of an original song but substitutes a different set of lyrics. Careful exploitation of a musical work is an important part of the marketing program of the music publisher (324a). A song originally released in one style (*e.g.*, pop) has the potential for adaptation to sound recordings in other styles (*e.g.*, country or rap). Musical works are also licensed for other types of uses, such as motion pictures. For example, Dolly Parton's "I Will Always Love You" was initially released in 1974 as a country music song and became a #1 hit; was revived in the movie "The Best Little Whorehouse in Texas" in 1984 and became a #1 hit again; and was covered once more in the Whitney Houston rhythm and blues version featured in the film "The Bodyguard" and went on to sell in excess of four million copies. When licenses are issued for parody versions of songs, restrictions are often placed on the uses to be made in order to avoid undermining other potential uses. A

redefinition of fair use to widen free copying for parodies would deprive copyright holders of this ability to maximize the exploitation of their works.

The likelihood of harm in any given parody case will vary; the fair use test of §107 is a sensitive barometer. Certain parodies of musical works will qualify as fair uses, with the consequence that the copyright owners of those works are not entitled to royalties from the parodists or other compensation for economic harm. It is no less true that other parodies of musical works will not constitute fair uses, so that the parodists using those works must have licenses to be shielded from infringement liability. This demarcation does not mean courts are being called upon to censor parodies. Instead, courts are required — as they have been since Justice Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) — to test each challenged use under the factors of § 107, looking at objective aspects such as amount taken and potential economic harm and not at aesthetic value. What seems clear beyond question is that the Court should decline the invitation to jettison the carefully evolved fair use factors in order to unleash a sweeping privilege to copy in favor of parodists.

II. 2 LIVE CREW'S "PRETTY WOMAN" IS NOT A FAIR USE OF "OH, PRETTY WOMAN."

Under the terms of § 107, as enacted by Congress and applied by the courts, 2 Live Crew has infringed Acuff-Rose's copyright in "Oh, Pretty Woman." The determination of the Sixth Circuit should be affirmed. Acuff-Rose will undoubtedly present to the Court, in broad strokes and in close detail, the reasons why an affirmance is warranted. The Songwriter/Publisher *amici* set forth below key facts that compel a finding of infringement. Put another way, we highlight the concern that allowing the defense of fair use in this case would threaten to bring about the adverse consequences for songwriters and music publishers described above (Point IC).

Within the range of commercial exploitation in the area of parody, 2 Live Crew's "Pretty Woman" is at the height; a more commercial use would be hard to imagine. At the time the album *As Clean As They Wanna Be* was about to be released, 2 Live Crew had already released two albums that had "gone Gold" (87a) — that is, sold more than 500,000 units (324a). The new album containing "Pretty Woman" was conceived for the mass market; it was predicted by petitioners' agent that the album "will be heard by hundreds of thousands" of persons (88a). By the time of the district court proceedings, this goal had been achieved; 248,000 copies had been sold (85a).

There is no indication in the record that petitioners intended to waive the income that would come to them through the sale of the album. Quite to the contrary, the disc label states "UNAUTHORIZED DUPLICATION WILL GET YOU MESSED UP" (90a). That colloquial formulation, together with the more traditional copyright notice on the album, confirms that petitioners were themselves seeking the protections of the Copyright Act that they now wish to deny to Acuff-Rose. *See also* Pet. Br. 37-38. Petitioners did not always hold this position. At or about the time that the album was released, petitioners understood that they were engaged in a commercial venture and that Acuff-Rose should be entitled to at least the compulsory license fee (85a).

Petitioners and their *amici* express concern about this Court's repeated statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 451. This concern, against the present record, is wholly misplaced. The first factor must weigh strongly against a finding of fair use. If the Court were to find in favor of 2 Live Crew, petitioners could justifiably call their next album *As Commercial As They Wanna Be*.

The second factor also weighs heavily in Acuff-Rose's favor. "Oh, Pretty Woman" is a creative work. Because it is a musical work, the compulsory license of § 115 is applicable, permitting a user to make a sound recording of the work subject to the statutory royalty and other provisions of that section. To make a version of this musical work that fundamentally changes its character, however, ordinarily requires express authorization from the copyright owner, and the balance of § 115 should not be quickly disturbed.

The third fair use factor adds markedly to the case against the fair use defense. There is little doubt that 2 Live Crew took a qualitatively substantial amount of "Oh, Pretty Woman," including repeated use of the most familiar musical passage of the song (32a, 139-40a). There was no need for such a substantial taking to conjure up the well-known "Oh, Pretty Woman": the song was a hit upon its release and has long been a "standard" that generates significant mechanical royalties (143-44a). Petitioners' full length song, drawing substantially from the original quantitatively in addition to qualitatively, is far different from the twenty-nine second parody accorded fair use treatment in *Fisher v. Dees* or the eighteen second parody accorded fair use treatment in *Elsmere*.

Finally, 2 Live Crew is in the business of making and distributing phonorecords. A major aspect of the exploitation of "Oh, Pretty Woman" — as expressly provided under §106 of the Copyright Act — is the sale of phonorecords (yielding mechanical royalties). *See* 17 U.S.C. § 106(3). While 2 Live Crew has asserted a parody defense, that is not how it positioned its album in the mass market. Nowhere on the album is there a reference to "parody"; on the contrary, the album gives credit to the composers of "Oh, Pretty Woman" and acknowledges copyright ownership by Acuff-Rose (90a). This album should be viewed as in direct competition with licensed recordings of the original work. Moreover, this version clearly presents competition for prospective rap versions of the

song and for prospective parodies of "Oh, Pretty Woman." Other parodists have shown an interest in the song, making unauthorized versions in the wake of the district court's finding that "Pretty Woman" was not an infringement (326a). A full length, mass-marketed recording of a musical work by a best selling group — especially where, as here, any listener would be able to identify the recording as a version of the original (140a) — is bound to affect potential markets for derivative works of the original copyrighted song. In sum, the fourth fair use factor also weighs heavily against a finding of fair use.

This case could, but need not, be decided largely on the presumption arising from commercial use. There is also ample supporting detail to tilt all factors of the fair use analysis strongly against a finding of fair use.

CONCLUSION

The Court should affirm the judgment of the court below.

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Respectfully submitted,

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